

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

ROBERT ANNABEL,

Plaintiff,

Case Number 08-15329-BC  
Honorable Thomas L. Ludington

v.

DAVID R. GENDERNALIK, R. M. DAVIS,

Defendants.

**ORDER ADOPTING IN PART AND REJECTING IN PART REPORT AND  
RECOMMENDATION, OVERRULING IN PART AND SUSTAINING IN PART  
PLAINTIFF'S OBJECTIONS, DISMISSING COMPLAINT WITHOUT PREJUDICE,  
AND DENYING AS MOOT ANY PENDING MOTIONS**

On September 15, 2008, pro se Plaintiff Robert Annabel filed a complaint alleging that Defendants David R. Gendernalik and R. M. Davis violated his rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, et seq.; and the First, Eighth, and Fourteenth Amendments. Plaintiff is currently incarcerated at Macomb Correctional Facility in New Haven, Michigan. The matter is before the Court on a report and recommendation [Dkt. # 12] issued by Magistrate Judge Charles E. Binder on April 9, 2009. The magistrate judge recommends sua sponte dismissing the complaint, with prejudice, because Plaintiff acknowledged on the face of his complaint that he did not meet the mandatory requirement of exhausting his administrative remedies prior to filing suit, as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e.

On April 20, 2009, Plaintiff filed objections to the report and recommendation. First, Plaintiff contends that his complaint does not demonstrate that he failed to exhaust administrative

remedies. Plaintiff contends that his complaint demonstrates that the grievance procedure was not available to him because Defendants would not have tolerated use of the grievance process. However, the generalized assertion that Defendants would not have tolerated use of the grievance process does not justify a conclusion that grievance procedures were not available. Thus, Plaintiff's first objection will be overruled. Plaintiff's second objection is that the complaint is not properly dismissed with prejudice when the basis for the dismissal is that Plaintiff has not exhausted administrative remedies. This objection will be sustained and Plaintiff's complaint will be dismissed without prejudice.

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation [Dkt # 12] is **ADOPTED IN PART** and **REJECTED IN PART**.

It is further **ORDERED** that Plaintiff's objections to the report and recommendation [Dkt. # 14] are **OVERRULED IN PART** and **SUSTAINED IN PART**.

It is further **ORDERED** that Plaintiff's complaint [Dkt. # 1] is **DISMISSED WITHOUT PREJUDICE**.

It is further **ORDERED** that any pending motions [Dkt. # 3, 8, 11] are **DENIED AS MOOT**.

s/Thomas L. Ludington  
THOMAS L. LUDINGTON  
United States District Judge

Dated: July 13, 2009

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on July 13, 2009.

s/Tracy A. Jacobs  
TRACY A. JACOBS